LIM HENG HOO v. TAN HOCK HAI & ORS.

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Wan Suleiman F.J.) June 16, 1976]
[Kuching — Federal Court Civil Appeal No. 139 of 1975]

Practice and Procedure — Costs — Separate defendants represented by separate solicitors and separate counsel — Whether entitled to separate sets of costs — R.S.C. 1957, O. 65, r. 27(8) and (47).

The appellant, a tenant, had sued the respondents for damages, declaration and injunctions. The 1st and 2nd respondents were represented by one firm of solicitors and the 3rd respondent by another firm of solicitors. The action was dismissed for want of prosecution and costs were awarded. Subsequently the two firms of solicitors merged. Two sets of costs were presented. On objection by the appellants, the learned Registrar allowed only one set of costs. On appeal the learned judge of the High Court reversed the decision of the Registrar and allowed two sets of costs. The appellant appealed.

Held: in this case as separate firms of solicitors were involved, two separate sets of costs were justified. The matter should go back to the Registrar to be reviewed in the light of the judgment of the court.

Cases referred to:—

(1) *Spalding* v. *A.W. Gamage Ltd. & Anor.* [1914-15] All E.R. Rep. 847.

(2) *Ager* v. *Blacklock & Co.* (1887) 56 L.T. 890.

FEDERAL COURT.

T.O. Thomas for the appellant.

Mathew Chan for the respondents.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): This is an appeal against the decision of the learned judge in reversing the order of the registrar when reviewing taxation of costs. The question is whether there should be one or two sets of costs.

The brief facts are that in 1971 plaintiff, a tenant, sued defendants claiming damages, declaration and injunctions. Chan & Co. acted for 1st and 2nd defendants while Jugah & Wan Ullok Co. for 3rd defendant. When pleadings were closed, plaintiff did not file any notice of trial pursuant to Order 36 rule 11 until February 1, 1972. So, counsel for the three defendants took out summonses separately under Order 36 rule 12 for an order that the action be dismissed for want of prosecution. The notice of trial was filed after the issuance of the summonses.

B.T.H. Lee J. who heard the applications on February 7, 1972 adjourned the summonses to open court for arguments on March 30, 1972. He gave his ruling on August 21, 1972 granting the defendants their application as he considered that the delay was inordinate and inexcusable. Being dissatisfied with the ruling plaintiff applied under Order 54 rule 22A for adjournment of the matter into court for further argument. This was granted. On January 12, 1973 the learned judge confirmed the ruling he made earlier on August 21, 1972 with costs to defendants. Mr. Mathew Chan of Chan & Co. appeared for 1st and 2nd defendants and Mr. Jugah of Jugah & Wan Ullok Co. for 3rd defendant at the hearings. An appeal against the decision of B.T.H. Lee J. was dismissed with costs by this court. On September 1, 1973 the two legal firms of Chan & Co. and Jugah, Wan Ullok & Co. merged and became Chan, Jugah, Wan Ullok & Co. On April 17, 1974 the newly merged company delivered a Bill of Costs on behalf of the defendants. Not unnaturally, the Bill incorporated two sets of costs, namely, one set for 1st and 2nd defendants and another set for 3rd defendant. The fact that the two firms have merged into one does not preclude the presentation of two sets of costs.

Mr. T.O. Thomas for the plaintiff objects to two sets of costs arguing that there should be only one set of costs for the three defendants under Order 65 rule 27(47) which reads: —

"47(1) Fees for more than one advocate for one party or set of defendants shall not be allowed unless the court or judge at the hearing or within seven days so certifies.

(2) Such fees may be allowed notwithstanding that both of the advocates are members of the same firm of solicitors."

The defendants submit that Order 65 rule 27(47) does not apply but that the appropriate rule is Order 65 rule 27(8) which reads: —

"(8) Where the same solicitor is employed for two or more defendants, and separate pleadings are delivered or other proceedings had by or for two or more such defendants separately, the Registrar shall consider in the taxation of such solicitor's bill of costs, either between party and party or between solicitor and client, whether such separate pleadings or other proceedings were necessary or proper, and if he is of opinion that any part of the costs occasioned thereby has been unnecessarily or improperly incurred, the same shall be disallowed."

In this case the parties do not dispute the question of discretion of the learned judge in awarding costs but the question here is whether there is to be one set or two sets of costs as the defendants are separately represented by different counsel.

Order 65 rule 27(47) speaks of "fees" and not "costs" for more than one advocate for one party or set of defendants. Mr. Thomas says this is irrelevant in a fused profession. We do not agree with him. The term "fees" here clearly refer to counsel's fees and is distinct from the term "costs" which is a term of art in law. Fees may be allowed as part of the costs in an action. A taxing master may allow the fee marked on the brief in taxing costs. It is because of the very fact that the two professions are fused that difficulty may arise in the interpretation of the Rules of the Supreme Court. The surprising thing is that such difficulty does not often come up. There are cases where two counsel or where a leading counsel and a junior counsel are briefed by a firm of instructing solicitors. In England it is the custom or practice to allow a junior counsel a fee of two-thirds of the fee marked for a leading counsel. It is not clear whether such custom or practice has been imported here when both counsel are from the local Bar or when the junior counsel is a member of the firm of instructing solicitors.

In the case under appeal Mr. Chan of Chan & Co. appeared as advocate for 1st and 2nd defendants consisting of one set of defendants while Mr. Jugah of Jugah, Wan Ullok & Co. for 3rd defendant. In other words, there are two separate sets of defendants.

There is nothing to prevent each set of defendants from employing a leading counsel and if successful in the action to ask for fees for two counsel under Order 65 rule 27(47). Whether such fees would be allowed or not is a matter for the learned trial judge. As a general rule a judge will not give a certificate unless the case is complex in nature and of sufficient importance involving difficult points of law to justify the employment of two counsel or a leading counsel and junior counsel. If plaintiff initiates an action against more than one defendant he cannot prevent defendants from being separately represented because of a conflict of interest. Mr. Thomas says that they have a common interest and should therefore be awarded one set of costs. The learned judge seems to think otherwise. Order 65 rule 27(47) applies only when there are, say, (a) two counsel or advocates for one party or (b) two counsel or advocates for one set of defendants. Order 65 rule 27(47)(2) makes this even clearer when it provides that such fees may be allowed notwithstanding that both of the advocates are members of the same firm of solicitors. However, the question of a certificate for two counsel does not arise in this case and the learned judge is right to rule that Order 65 rule 27(47) has no application.

Since there is one advocate for two defendants and another for a third defendant, there would be two sets of costs unless the learned trial judge ordered otherwise. In running down cases defendants are usually separately represented and if successful they get separate sets of costs. No one has yet suggested that they should get only one set of costs.

Order 65 rule 27(8) applies where the same solicitor or advocate is engaged by defendants and he delivers separate pleadings for them. This is not the case here. Chan & Co. acted for 1st and 2nd defendants and filed separate pleadings for them while Jugah, Wan Ullok & Co. did the same for 3rd defendant. The two firms merged after the dismissal of the action with costs. The learned judge is right to rule that Order 65 rule 27(8) does not apply to the facts of the present case.

With reference to Order 65 rule 27(8) the case of *Spalding* v. *A.W. Gamage Ltd. & Anor.*[1] may be cited. There G. Ltd. and B. Ltd. the defendants to an action appeared by the same solicitor, but put in separate defences and employed separate leading counsel at the trial. The plaintiffs won the action at first instance, but on appeal to the Court of Appeal the defendants succeeded and the action was dismissed, with costs in the court below and in the Court of Appeal. On taxation the taxing master, acting under R.S.C. Ordinance 65 rule 27(8), disallowed the costs of the separate defence put in by B. Ltd. and of their counsel on the ground that the two companies were practically identical and should have joined in the same defence. G. Ltd. held three-fourths of the share capital in B. Ltd. On a summons to review the taxation taken out by the defendants, it was held that under Ordinance 65 rule 27(41) the court had power to review the discretion exercised by the taxing master under rule 27(8) of Ordinance 65, and in the present case the court would direct the taxing master to allow the costs he had disallowed because on the facts the two defendants were not practically identical and there was a reasonable probability of there being substantial differences in their defences at the trial.

The facts of the present case under appeal are stronger since 3rd defendant on the one hand and the 1st and 2nd defendants on the other, had been separately represented by different firms and advocates from the very beginning of the action. The registrar seemed to be influenced by certain considerations, particularly that it would be punitive to award two sets of costs. He should not have allowed such things to influence him. These clouded his decision. In *Spalding's case*[1] Sargant J. in effect followed the case of *Ager* v. *Blacklock & Co.*[2] where the defendants had joined in a statement of defence and afterwards had appeared separately at the trial, so that it was a stronger case than *Spalding's case*[1] in favour of the disallowance of separate sets of costs. Kekewich J. held that the matter was not one purely in the taxing master's discretion, and came to the conclusion that the defences of the two defendants were so separate in principle that two sets of costs ought to be allowed. He held further that he was entitled, as a question of principle, to overrule the decision of the taxing master. Accordingly, he made an order that both sets of defendants would get their costs.

The learned judge was clearly right to reverse the decision of the registrar in this case. It is possible that had the case gone to trial there might be a divergence between the defences of the defendants on material points. The registrar was wrong to allow only one set of costs in the circumstances. We do not think he has any discretion to exercise since separate firms of solicitors are involved justifying two separate sets of costs. The matter should go back to the registrar to be reviewed in the light of the judgment of this court. Costs to respondents. Deposit against taxed costs.

Order accordingly.

Solicitors: *Thomas & Co.; Chan, Jugah, Wan Ullok & Co.*